

**United States Department of Labor
Employees' Compensation Appeals Board**

E.L., Appellant

and

**U.S. POSTAL SERVICE, AIR MAIL CENTER,
New Orleans, LA, Employer**

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**Docket No. 10-1946
Issued: August 23, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 21, 2010 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated January 26 and June 2, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly reimbursed appellant for health insurance premiums; and (2) whether appellant met her burden of proof to establish that a June 30, 1999 wage-earning capacity decision should be modified.

On appeal appellant asserts that she is due additional reimbursement for health insurance premiums and that her wage-earning capacity was based on an incorrect pay rate.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 22, 2000 appellant, then a 47-year-old Grade 5 Step B part-time flexible (PTF) clerk, filed an occupational disease claim, alleging that factors of her federal employment caused plantar fibromatosis and seronegative arthritis. Mitchell Roberts, supervisor of distribution operations, advised that she was terminated on July 31, 1999. The employing establishment controverted the claim and provided documentation.² Appellant had stopped work on July 20, 2009 and was on administrative leave from July 20 to 30, 2009. A Form SF-50 provides that her last day in pay status was July 30, 1999 and she was terminated effective February 1, 2000. On May 3, 2000 OWCP accepted permanent aggravation of preexisting plantar fasciitis.

Appellant submitted a claim for compensation for the period October 21, 2000 to March 3, 2001, that was denied in a March 28, 2001 decision. This decision was affirmed by OWCP's hearing representative on February 20, 2002. On January 6, 2003 appellant requested reconsideration and by decision dated January 24, 2003, OWCP vacated the February 20, 2002 decision and determined that appellant was entitled to wage-loss compensation beginning July 31, 1999. She filed additional claims for compensation, and submitted information about her work history from February 2000.³ OWCP noted that leave analysis forms indicated that appellant worked a 40-hour week, and that her pay rate effective the date disability began on July 30, 1999 was \$15.38 an hour or \$615.20 a week, plus an increment of \$32.25 due to sporadic night and Sunday differential pay, for a total weekly pay rate of \$647.45.

By letter dated May 21, 2003, OWCP notified the employing establishment to void termination of appellant's health insurance enrollment and make the transfer effective July 31, 1999. Appellant was paid compensation for the periods July 31, 1999 to January 31, 2000 and July 1, 2000 to May 20, 2001. Deductions for health insurance of \$198.90 and \$724.53 were made. On June 4, 2003 the employing establishment asked its personnel office to void the termination of appellant's health insurance enrollment, and on July 8, 2003 it notified OWCP that health benefits were transferred to OWCP. This, however, was not done.

On September 4, 2003 appellant reported that she was terminated from private employment effective August 31, 2003 and filed a compensation claim beginning in April 2003. In a September 3, 2006 letter, she stated that she had been working for the Department of Veterans Affairs (VA) in Jackson, Mississippi since January 12, 2004. On September 19, 2006 appellant filed a claim for compensation beginning on January 4, 2002. She submitted wage and tax statements for the years 2002 through 2005 and an earnings and leave statement from the VA for the pay period ending October 28, 2006. In a December 29, 2006 letter, OWCP notified appellant of the type of medical evidence needed to support her claim. On February 26, 2007 appellant informed OWCP that she had moved to Seattle, Washington.

² This included evidence about light-duty assignments for seronegative arthritis, bone spurs and plantar fasciitis, for a 1997 claim accepted for left foot sprain, medical reports, leave analysis, a letter of removal effective July 31, 1999 and a February 1, 2000 Merit Systems Protection Board decision finding the removal reasonable.

³ Appellant noted that from July 31, 1999 to February 1, 2000 she was unemployed, that from February to June 2000 she was employed by the U.S. Census Bureau as a clerk, was unemployed from June 2000 to May 21, 2001, that from May 21 to September 3, 2002 she was employed as a claims officer and security guard and from October 2002 as a claims officer.

On April 2, 2007 OWCP verified that the current base pay rate for appellant's grade and step was \$19.00 an hour with no premium pay. The VA verified that she was employed there beginning January 11, 2004 at an annual salary of \$33,708.00, with no additional pay. By decision dated April 26, 2007, OWCP found that appellant's actual earnings of \$648.23 per week as a VA claims clerk fairly and reasonably represented her wage-earning capacity, with zero loss. It noted that she was reemployed with the VA effective January 11, 2004 and had worked in the job for two months or more.

In a May 1, 2007 decision, OWCP denied appellant's claim for monetary compensation from January 4, 2002 to December 19, 2006 as the medical evidence did not establish the claimed disability.

On June 25, 2007 appellant requested reconsideration of the April 26 and May 1, 2007 decisions. She was paid wage-loss compensation for the period February 1 through June 30, 2000, and a deduction of \$170.52 was made for health benefits. In a merit decision dated July 17, 2007, OWCP denied modification of the April 26 and May 1, 2007 decisions on the grounds that the medical evidence did not support a change in medical condition or that appellant was disabled from performing the duties of claims clerk with the VA. On December 27, 2007 appellant requested reconsideration of the July 17, 2007 decision and submitted medical evidence.

By decision dated May 1, 2008, OWCP modified its previous decisions to find entitlement to wage-loss compensation from January 2, 2002 to January 10, 2004. It also found that there was no evidence to support modification of the April 26, 2007 wage-earning capacity determination.⁴

On May 15, 2008 appellant claimed compensation from May 20, 2001 to January 4, 2002. The employing establishment stated that it was unable to provide appellant's earnings for the year preceding July 20, 1999, and advised that the current pay rate for appellant's position was \$36,203.00 per year.

By letter dated July 21, 2008, OWCP referenced the period January 1, 2000 to January 10, 2004 and described appellant's actual earnings during the period. It noted that she had previously received compensation during the period January 1 to December 31, 2000, when she had earnings, thus creating an overpayment in the amount of \$2,776.40. OWCP awarded total disability compensation for the period January 1 to May 20, 2001, when appellant had no earnings, and applied a loss of wage-earning capacity to compensation for the period May 21, 2001 to January 10, 2004, when she began work at the VA. It found that she was entitled to net entitlement of \$18,056.13. OWCP advised appellant that the overpayment of \$2,776.40 could be deducted from the net entitlement, but that she would have to sign a concurrence, which appellant signed on July 22, 2008. An OWCP pay rate memorandum described the method used to determine appellant's pay rate.

In an undated letter, received by OWCP on March 2, 2009, appellant asked that deductions for health insurance coverage be reimbursed. She stated that her health insurance

⁴ On a May 13, 2008 OWCP 1032 form, appellant indicated that she was receiving VA benefits for fibromyalgia, knee arthritis, a broken ankle, hearing loss and tinnitus.

was terminated on January 11, 2000, that she was on leave without pay from July 31, 1999 to February 1, 2000 when she was terminated by the employing establishment, and there had been no payments for medical coverage since February 1, 2000 but that health benefit deductions had been made from her retroactive compensation. Appellant also asserted that she was not informed that she could challenge the overpayment finding in the July 21, 2008 letter, and that she was compensated at an incorrect pay rate. She attached OWCP policies regarding pay rate calculations, and a letter from BlueCross BlueShield of Louisiana which indicated that she had coverage for the period November 9, 1996 to January 11, 2000. Appellant reiterated these assertions in a letter received on April 9, 2009.

OWCP confirmed that appellant's health benefits were terminated effective February 1, 2000, and by letter dated April 20, 2009, informed her that she was eligible for a refund for health benefits premiums in the amount of \$895.05 for the period February 1, 2000 to May 20, 2001. Appellant was reimbursed this amount. OWCP also provided her a compensation payment history. In a second April 20, 2009 letter, it reviewed appellant's claim history and explained how her pay rate for compensation purposes was calculated, noting that her disability from employment began on July 20, 1999, and the salary in effect on that date was reflective of her employment. OWCP also noted that by decision dated April 26, 2007 she was found to have a zero percent loss of wage-earning capacity, based on her actual earnings.

In a letter received by OWCP on October 27, 2009, appellant voiced her disagreement with OWCP decisions regarding reimbursement for health benefit premiums, pay rate for compensation purposes and the declared overpayment.

By decision dated January 26, 2010, OWCP found that appellant had been properly refunded health benefit premiums for the period February 1, 2000 to May 20, 2001 and that she was not entitled to a further refund. It noted that her share of the premium was \$895.05, which was refunded to her, and that the employing establishment's share of the premium, or \$2,922.56 was refunded to it. OWCP further noted that no health insurance premiums were deducted from her wage-loss compensation after May 20, 2001. It again provided her a copy of her payment history. OWCP print-outs show that no deductions for health insurance were made for the period May 21, 2001 to January 10, 2004, when appellant returned to work at the VA.

In a letter received on April 5, 2010, appellant requested reconsideration. The employer informed OWCP that the pay rate for a Grade 5, Step B PTF clerk on January 14, 2004, the date of her new employment with the VA, was \$16.44 an hour. By decision dated June 2, 2010, it found that the computation of wage-earning capacity in the April 26, 2007 decision was in error, and modified the April 26, 2007 wage-earning capacity decision to reflect appellant's correct wage-earning capacity based on her actual VA earnings as a claims clerk. OWCP reviewed her claim and payment history and found that the pay rate in effect on the date disability began on July 20, 1999 was the effective pay rate for compensation purposes. It found that appellant's pay rate as of January 11, 2004 was \$16.44 per hour, and that the correct pay rate formula to be used in calculating her pay rate was based on 2,000 hours.⁵ Thus, as of January 11, 2004, the formula established a weekly pay rate of \$666.78, whereas appellant's actual earnings with the VA were

⁵ OWCP noted that, as a PTF employee, appellant was not paid for holidays and noted that the maximum hours a PTF employee can work is 2,000.

\$648.23 weekly. OWCP applied the *Shadrick* formula⁶ and recomputed appellant's loss of wage-earning capacity, finding a 97 percent wage-earning capacity, which yielded a compensation payment of \$65.00 each four weeks.⁷

LEGAL PRECEDENT -- ISSUE 1

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employees' Health Benefits (FEHB) program, provide guidelines for registration, enrollment and continuation of enrollment of federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides that an employee or annuitant is responsible for payment of the employee or annuitant share of the cost of enrollment for every pay period during which the enrollment continues.⁸

OPM, rather than OWCP, has jurisdiction over the matter of health insurance deductions from compensation, and over enrollment under the FEHB.⁹ OPM regulations provide guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, section 890.502(a)(1) provides that an employee or annuitant is responsible for payment of the employee's share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefit withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.¹⁰ In addition, section 890.502(c)(1) provides that an agency that withholds less than or none of the proper health benefits contributions from an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of Title 5 of the United States Code, to OPM for deposit in the Employees Health Benefits Fund.¹¹ When OWCP deducts less than the proper health benefit premium for the coverage selected, an overpayment in compensation is created.¹² The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment in compensation because OWCP must pay the full premium to OPM when the error is discovered.¹³

⁶ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision, *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.

⁷ OWCP did not address the issue of reimbursement of health benefit premiums. On June 8, 2010 appellant was paid compensation from January 11, 2004 through June 5, 2010, to reflect the new compensation rate, and was placed on the periodic rolls at that rate.

⁸ 5 C.F.R. § 890.502(a)(1); *see T.S.*, Docket No. 08-1604 (issued March 13, 2009).

⁹ *Raymond C. Beyer*, 50 ECAB 164 (1998).

¹⁰ 5 C.F.R. § 890.502(a)(1).

¹¹ 5 U.S.C. § 8906; *id.* at § 890.502(c)(1).

¹² *See John Skarbek*, 53 ECAB 630 (2002).

¹³ *James Lloyd Otte*, 48 ECAB 334 (1997).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly reimbursed appellant for health benefit premiums. The record indicates that, while OWCP notified the employing establishment to void termination of appellant's health insurance enrollment on May 21, 2003, the termination was not voided. In 2003 appellant was paid compensation for the periods July 31, 1999 to January 31, 2000 and July 1, 2000 to May 20, 2001. Deductions for health benefits of \$198.90 and \$724.53 were made, respectively. In 2007 appellant was paid wage-loss compensation for the period February 1 through June 30, 2000, and a deduction of \$170.52 was made for health benefits. By letter dated April 20, 2009, OWCP informed appellant that she was eligible for a refund of \$895.05 for the amount of health benefit premiums deducted from February 1, 2000 to May 20, 2001 and she was reimbursed that amount.

Appellant's health benefits were terminated on February 1, 2000, and were not resumed when she was placed on the compensation rolls. She was therefore not entitled to reimbursement of the \$198.90 deducted from her compensation for health benefits for the period July 31, 1999 to January 31, 2000. Deductions of \$724.53 and \$170.52 were made for her portion of health insurance benefits the period February 1, 2000 to May 20, 2001, for a total of \$895.05 deducted for health insurance premiums when appellant was not covered by the insurance. Appellant was reimbursed this amount in April 2009.

The record supports that no deductions were made for the period May 21, 2001 to January 10, 2004, when appellant resumed employment at the VA. OWCP properly found that appellant was entitled to a reimbursement of \$895.05 for deductions of her portion of health benefit premiums and paid her this amount.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision on this issue, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁴ OWCP procedures provide that it can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.¹⁵

The procedures further provide that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the

¹⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

request according to the customary criteria for modifying a formal loss of wage-earning capacity.”¹⁶ Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁸

In addition, Chapter 2.814.11 of OWCP’s procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant’s medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.¹⁹

OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment. The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant’s wage-earning capacity, and work stoppage did not occur due to any change in the claimant’s injury-related condition.²⁰ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick*, 5 ECAB 376 (1953) decision, has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee’s wage-earning capacity in terms of percentage by dividing the employee’s earnings by the current pay rate for the date-of-injury job.²¹ Its procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.²²

ANALYSIS -- ISSUE 2

Appellant did not allege that her medical condition has changed or that she has been vocationally rehabilitated. Rather, she asserted that the June 2, 2010 decision that modified her wage-earning capacity was in error because it was based on an incorrect pay rate. Under section

¹⁶ Federal (FECA) Procedure Manual, *id.* at section 2.814.9(a) (December 1995).

¹⁷ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹⁸ *Id.*

¹⁹ Federal (FECA) Procedure Manual, *supra* note 15 at section 2.814.11 (October 2009).

²⁰ *K.S.*, Docket No. 08-2105, issued February 11, 2009; Federal (FECA) Procedure Manual, *id.* at sections 2.814.7(c) and 2.814.7(e) (October 2009).

²¹ 20 C.F.R. § 10.403(c).

²² Federal (FECA) Procedure Manual, *supra* note 15 at section 2.814.7(c) (October 2009); *see J.K.*, Docket No. 08-1148 (issued March 13, 2009).

8101(4) of FECA, monthly pay for compensation purposes is the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work for the United States.²³ In this case, appellant's disability began on July 20, 1999, and this was also the date of last exposure to employment factors that caused her accepted condition. OWCP therefore properly determined that appellant's base pay rate on July 20, 1999 was the proper pay rate for compensation purposes.

The case will be remanded for further development with regard to the calculation of appellant's wage-earning capacity.²⁴ Section 2.900 of OWCP procedures describes the method to be used in determining pay rates,²⁵ including the method for determining pay rates of postal employees. Section 900.10c(1) states that to determine the pay rate for postal workers employed on an hourly basis, the hourly wage is multiplied by 2,080, then divided by 52, and for employees who work less than a full schedule, the hours should be prorated.²⁶ In discussing the pay rate calculation, the June 2, 2010 decision states:

"The Dallas District Office's [calculation] was based on 2[,]080 hours for a regular postal employee, while the Seattle District Office used the correct calculation method of 2[,]000 hours since the claimant was a PTF and the maximum number of REGULAR hours a PTF can work in a year is 2[,]000 hours per year. (Not paid for holidays)." (Emphasis in the original.)

A review of OWCP procedures, however, shows the procedures provide that PTF employees "are not paid *extra* for holidays, as their basic pay rate includes an increment for holidays."²⁷ (Emphasis added.) This leads to a reasonable assumption that a PTF employee would not be entitled to extra holiday pay, not that a PTF employee would not be paid at all for working on a holiday -- just that the employee would receive regular wages and not holiday differential. OWCP procedures do not include the "2000" formula, and there is nothing in the record from the employing establishment to justify that a PTF employee can only be paid for 2,000 hours a year and receive no pay for any holiday work.

As OWCP did not fully address how it determined appellant's pay rate for compensation purposes in establishing her loss of wage-earning capacity, the June 2, 2010 decision modifying appellant's wage-earning capacity will be vacated and the case remanded to OWCP for further development on this issue. After such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding the pay rate on which her loss of wage-earning capacity determination is based.

²³ 5 U.S.C. § 8101(4).

²⁴ The Board notes that the method of using average annual earnings was not available in this case, as the employing establishment reported that it was unable to provide appellant's earnings for the year preceding July 20, 1999, although it reported that she worked a 40-hour week.

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900 (April 2002).

²⁶ *Id.* at Chapter 2.900.10.c(1).

²⁷ *Id.* at Chapter 2.900.3.b(2)(a).

CONCLUSION

The Board finds that OWCP properly reimbursed appellant \$895.05 for her portion of health insurance premiums, and that OWCP did not sufficiently explain its calculation of her pay rate for computation purposes used to determine her wage-earning capacity such that the case must be remanded to OWCP for further development on this issue.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2010 decision of the Office of Workers' Compensation Programs be affirmed and the June 2, 2010 decision be vacated and the case remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: August 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board